No. _____

In the
SUPREME COURT of the UNITED STATES

DAVID LAMBERTSEN

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

QUESTIONS PRESENTED

1. Were David Lambertsen's substantive rights under U.S. Constitution, Amendments Five and Six violated when, under a mandatory Sentencing Guidelines regime, the Court enhanced his custodial sentence based upon "relevant conduct" statements presented to the Court by the United States Probation Office and found to be "facts" by the Court by a preponderance of the evidence?

2. Were David Lambertsen's rights under the Confrontation Clause, U.S. Const., Amendment Six, violated (a) when the trial Court relied on hearsay testimony from the probation officer concerning monetary loss; and (b) when the Court used this hearsay evidence to enhance Mr. Lambertsen's sentence under mandatory sentencing guidelines?

3. Did the lower Court err when it decided United States v. Booker, 125 U.S. 738 (2005), which developed longstanding, substantive Constitutional rights and Supreme Court precedent, did not apply to David Lambertsen's sentencing enhancements because he raised his issues in a timely-filed motion pursuant to 28 U.S.C. §2255, and not during his direct appeal?

4. Were David Lambertsen's rights to effective assistance of counsel violated when his attorney failed to object to a jury instruction that suggested the jury *should* find him not guilty of conspiracy if they had reasonable doubt, instead of instructing the jury it *must* find Lambertsen not guilty if they had reasonable doubt?

a. If so, did such erroneous jury instruction prejudice Mr. Lambertsen, as evidenced by the fact that the jury found Mr. Lambertsen not guilty of the underlying charge of mail fraud but guilty of conspiracy to commit mail fraud?

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Direct Appeal

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Orders concerning motion filed under 28 U.S.C. 2255 in the District Court

David Lambertsen v. United States of America, 3:04-CV-327 (Northern District of Indiana South Bend Division)

- *Entered* January 24, 2005 - The Court denied the motion with prejudice on with respect to every claim except the Blakely/Booker claim.
- *Entered* March 4, 2005 – The District Court denied the Motion for a Certificate of Appealability

Order Concerning Motion for Certificate of Appealability in the Circuit Court

David Lambertsen v. United States of America, 05-1708 (7th Circuit Decided July 7, 2005) Mandate issued on August 29, 2005.

JURISDICTIONAL STATEMENT

David Lambertsen filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255 in the Federal District Court for the District of Indiana, South Bend Division. When his motion was denied, he sought a certificate of appealability from the Seventh Circuit Court of appeals. The Seventh Circuit denied his request for a

certificate of appealability. He now petitions the United States Supreme Court for a writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI of the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTES

18 U.S.C. §1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be

delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1342. Fictitious name or address

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to

effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT OF THE CASE

David Lambertsen was indicted for mail fraud under 18 U.S.C. §1341 and 18 U.S.C.§1342 and conspiracy to commit mail fraud under 18 U.S.C. §371. After a jury trial, he was acquitted of the mail fraud but convicted of the conspiracy to commit mail fraud. As evidenced by their questions, the jury was unsure of the level of intent needed in order to find Lambertsen guilty of conspiracy.

Under the United States Sentencing Guidelines, the base offense for theft crimes is a level 6. For a defendant in a criminal history category 1, this translates to 0 to 6 months of incarceration. However, Lambertsen received multiple enhancements which increased his sentence to sixty months – the statutory maximum.

One of Lambertsen's enhancements was for *obstruction of justice* based on the trial Court's determination that Lambertsen most likely perjured himself when his testimony differed from the testimony of one of the government's witnesses. This fact was not given to the jury. Nor was it found beyond a reasonable doubt.

Lambertsen also received increased penalties based on the testimonial hearsay of the probation officer concerning the monetary value of the loss incurred by the

alleged victims. At no point was Lambertsen given the opportunity to cross exam these witnesses.

None of the facts which led to these enhancements were found by a jury or found beyond a reasonable doubt. Instead, they were based in large part on Mr. Lambertsen's PSI, the probation officer's conversations with the alleged victims, and the trial Court's feeling concerning Lambertsen's credibility.

After Lambertsen lost his direct appeal, he filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. While his motion was pending, this Court decided United States v. Booker, 125 U.S. 738 (2005).

The District Court made a determination that *Booker* does not apply to motions filed under 28 U.S.C. §2255 (a fact not yet decided by this Court) and denied Lambertsen's motion. The Seventh Circuit denied Lambertsen's Motion for Certificate of Appealability.

REASONS FOR GRANTING THE PETITION

I. David Lambertsen's due process rights were violated when his sentence was enhanced significantly pursuant to a mandatory sentencing guideline system based on facts that were not found beyond a reasonable doubt.

David Lambertsen was convicted of conspiracy to commit mail fraud, a base level 6 offense under the Sentencing Guidelines. Because Lambertsen had no prior criminal history, he could have received a sentence which included no jail time. Even if he had been sentenced to the outside range of the sentencing guidelines, he would have received a maximum sentence of six months. Instead, he received a sentence of 60 months of incarceration – ten times the maximum sentence he faced based on the jury verdict. His sentence was increased by at least ten times based in large part on facts set forth by an "investigation" and testimonial hearsay of a probation officer found by a preponderance of the evidence by a judge.

After Lambertsen's motion for relief under 28 U.S.C. §2255 was denied by the US District Court, the Seventh Circuit denied his motion for a Certificate of Appealability and stated "We find no substantial showing of the denial of a constitutional right." David Lambertsen v. United States of America, 05-1708 (7th Circuit Decided July 7, 2005). The Seventh Circuit's decision in this case is in conflict with a long line of cases from This Court including but not limited to In re Winship, 397 US 358 (1970), In Re Gault, 387 U.S. 1 (1967), Jones V. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000).

Constitutional due process requires that whenever a defendant is charged with a crime, he must be acquitted unless the Government establishes every element beyond a reasonable doubt. In re Winship, 397 US 358 (1970). Because the U.S. Sentencing Guidelines were mandatory at the time Mr. Lambertsen was sentenced, due process required that every fact that increased his sentenced beyond the base offense level of 6 be found beyond a reasonable doubt. This principle was stated in Apprendi v. New Jersey, 530 U.S. 466 (2000) and further defined in Blakely v. Washington, No. 02-1632 (decided June 24, 2004) and United States v. B oker, No. 04-104 (decided January 12, 2005).

II. David Lambertsen's substantial rights under the confrontation clause of the US Constitution were violated when his sentence under the mandatory sentencing guidelines was enhanced based on testimonial evidence of the probation officer.

After David Lambertsen was convicted, the probation officer prepared a presentence investigation report (PSI). As part of her investigation, the probation officer interviewed some of the alleged victims. She included quotes from them in her PSI. The alleged victims did not appear at trial or sentencing. Lambertsen was not given the opportunity to cross exam these victims. To the contrary, he wasn't even able to speak to them. As a practical matter, if he had attempted to speak to them outside of a court hearing, he risked being charged with witness tampering.

A Defendant's right to confront the witnesses against him dates back to early common law and is a bedrock principle of our Constitution. When a defendant

is denied the right to confront his accusers, the reliability of their out of court statements is questionable.

The Seventh Circuit's decision that enhancing Lambertsen's sentence was not a denial of a substantial right conflicts with a long line of cases in this Court. Lambertsen's enhancements were based in large part on testimonial hearsay of the probation officer. Lambertsen did not have the opportunity to cross exam the alleged victims at his sentencing hearing – or at a previous hearing. Most recently, this Court gave a historical analysis of a defendant's confrontational rights when it decided Crawford v. Washington, No. 02-9410 (decided March 8, 2004). Crawford gave a detailed overview of the Constitutional importance of the right to confront a witness.

Additionally, the Seventh Circuit's decision in Lambertsen's case conflicts with a principle set forth recently in the First Circuit. In United States v. Jimmy Taveras, No. 03-2140 (1st Cir. Decided 8/17/2004) the First Circuit was presented with a case in which a Defendant's supervised release was revoked based solely on the hearsay testimony of his probation officer. During a revocation hearing, Taveras' probation officer testified that a woman named Elsa Pabon called her and told her that Taveras had threatened her with a gun. Pabon did not appear at the hearing and Taveras did not have the opportunity to cross exam her. The only evidence presented at the hearing was the probation officer's testimony. Taveras was found to have violated the conditions of his supervised release and his supervised release was revoked. On appeal, the First Circuit found the prejudice to Taveras was "unmistakable" and the decision to revoke his supervised release was vacated.

III. The trial Court erred when it found that the principles delineated in United States v. Booker, 125 U.S. 738 (2005) did not apply to Lambertsen because he challenged his sentence during a timely filed motion under 28 U.S.C. §2255 and not during his direct appeal.

The *Booker* issues in Lambertsen's case are not merely procedural. They are based on substantial rights that are firmly rooted in our Constitution. Lambertsen had a right not to have his sentence enhanced except by facts found beyond a reasonable doubt. He also had a right to confront all the witnesses whose statements enhanced his penalty. The denial of these rights casts doubt as to whether the information used against Lambertsen was reliable information. Because the information was not reliable, a man who should be free remains incarcerated. This proposition flies in the face of precedent in this Court as well as the foundation upon which our Country and our Constitution was built.

The Seventh Circuit decision in this case conflicts with longstanding precedent in this Court including but not limited to In re Winship, 397 US 358 (1970), In re Gault, 387 U.S. 1 (1967), Jones v. U.S. 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000). It is also in conflict with Crawford.

When a defendant files a motion pursuant to 28 U.S.C. §2255 he challenges the Constitutional underpinnings, the statutory basis, and the fundamental fairness of his conviction and or sentence. Congress created 28 U.S.C. §2255 as a vehicle to allow defendants to seek justice when something in their trial or appeal went wrong.

According to the 1976 Advisory Notes to Rule 1 of the Rules of Section 2255 Proceedings, "[A] motion

under §2255 is a further step in the movant's criminal case and not a separate civil action." The Advisory notes further state "Although Rule 1 indicates that these rules apply to a motion for a determination that the judgment was imposed 'in violation of the ...laws of the United States,' the language of 28 U.S.C., it is not the intent of these rules to define or limit what is encompassed within that phrase." 1976 Advisory Committee Notes to Rule 1.

The majority of the Circuit Courts have decided that *Booker* is not "retroactive" and does not apply to cases brought pursuant to 28 U.S.C. §2255. This contradicts the purpose of the statute.

As of yet, this Court has not specifically stated whether *Booker* applies to cases on collateral review. This is an issue which needs to be addressed and decided in this Court. Until this Court decides whether *Booker* is retroactive, the circuit courts will have to continue to guess.

IV. The trial Court erred when it did not instruct the jury that it must acquit Lambertsen if it had reasonable doubt as to his guilt.

David Lambertsen had a right to be found not guilty unless the government proved all elements beyond a reasonable doubt. When the trial Court did not tell the jury this was mandatory, Mr. Lambertsen's rights were violated. This decision is in conflict with a long line of cases in this Court, including but not limited, to *Winship*.

[APPENDIX A]

United States District Court

Northern District of Indiana

DAVID LAMBERTSEN
Petitioner

JUDGMENT IN A CIVIL CASE

v.

Case No. 3:04 CV 327-RM
(Arising out of 3:01CR4 (03) RM)

UNITED STATES OF AMERICA
Respondent

[ ] **Jury Verdict.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

District Court Order Entered 1/24/2005

IT IS ORDERED AND ADJUDGED the court DENIES the 2255 petition **with prejudice** as to every claim but the Blakely/Booker claim, which the court denies **without prejudice,** [Boc. No. 200] and DENIES the motion to dismiss the indictment [Doc. No. 203].

Stephen R. Ludwig, Clerk

/s/RMNagy

By_____

Deputy Clerk

Equivalent Coupon Issue Yield: N/A

This document entered pursuant to Rules 79(a) and 58 or the Federal Rules of Civil Procedure on **January 24, 2005**

[APPENDIX B]

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DAVID LAMBERTSEN,	)	
Petitioner	)	
	)	CAUSE NO.
	)	3:04 CV-32RM
UNITED STATES OF	)	3:01-CR-4 (03) RM
AMERICA,	)	
Respondent	)	

MEMORANDUM AND ORDER

On May 24, 2004 David Lambertsen filed a petition to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. 2255, and moved the court dismiss count forty-nine of the indictment, pursuant to Fed. R. Crim. P. 12(b) (3)(B). Following a series of subsequent amendments, the government responded by objecting to Mr. Lambertsen's petition and motion. For the following reasons, the court summarily denies both the petition and the motion to dismiss.

BACKGROUND

On February 14, 2001, a grand jury returned a forty-nine-count indictment against Mr. Lambertsen, charging

multiple counts of mail fraud, 18 U.S.C. 1341 and 1342, and conspiracy to commit mail fraud, 18 U.S.C. 371 and 372. After trial in November 2001, a jury found Mr. Lambertsen guilty of conspiracy to commit mail fraud. Mr. Lambertsen immediately moved the court for a new trial, which the court denied. The court sentenced Mr. Lambertsen to 60 months in prison, followed by three years of supervised release, and ordered him to pay $1,521,801.30 in restitution plus a $100.00 special assessment.

Mr. Lambertsen appealed his conviction, arguing a supplemental instruction given to the jury was improper, and that court incorrectly determined Mr. Lambertsen's sentence. The court of appeals affirmed both the conviction and the sentence. United States v. Sims, 329 F.3d 937 (7th Cir. 2003). Within a year after the court of appeals' ruling, Mr. Lambertsen filed and amended the petition and motion now before the court.

I.28 U.S.C. §2255 Petition

Mr. Lambertsen's §2255 petition raised multiple issues. Because Mr. Lambertsen did not raise some of these issues at either the trial or appellate level, he must now show cause excusing his failure to do so and actual prejudice resulting from the errors of which he complains. United States v. Frady, 456 U.S. 152, 167-8 (1982); Menzer v. United States, 200 F.3d 1000, 1005 (7th Cir. 2000). Mr. Lambertsen asserts his failure to raise these issues previlusly is due to the constitutionally ineffective assistance he received from his trial and appellate counsel.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

A valid claim of ineffective assistance of counsel may constitute cause for failing to raise an issue prior to a 2255 petition. Murray v. Carrier 477 U.S. 478, 488 (1986); Castellanos v. United States, 26 F. 3d 717, 718 (7th Cir. 19940. However, "so long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, 466 U.S. 668 (1984), there is no inequity in requiring him to bear the risk of attorney error that results in procedural default." Murray v. Carrier, 477 U.S. at 479. The court's inquiry, the turns, to whether Mr. Lambertsen received constitutionally ineffective assistance of counsel.

The Sixth Amendment provides in relevant part that "(i)n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." U.S. Const. amend. VI. An attorney must not only be present with a criminal defendant at his trial, but must assist the defendant in a way that ensures the trial is fair. Strickland v. Washington, 466 U.S. at 685. A fair trial is one in which the adversarial process functions properly to produce a just result. Id. at 686.

To sustain a claim of ineffective assistance of council, a defendant must show:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment, Second, the defendant must show that the deficient performance prejudiced the defense. This requiers showing that counsel's errors were so serious as to

> deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687. The defendant must prove both deficient performance and actual prejudice for the court to find that his Sixth Amendment right to counsel was violated. Id.

The court must determine whether the attorney's assistance was objectively reasonable in light of all the circumstances. Strickland v. Washington, 466 U.S. at 687-688. There is no detailed set of criteria on which the court should judge counsel's performance, and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

A petitioner establishes actual prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. This burden of proof, requiring a showing of "reasonable probability," is only slightly less stringent than the "preponderance of the evidence" standard typically applied in civil cases. Strickland v. Washington, 466 U.S. at 697. "A reasonable probability is a probability sufficient to undermine conficence in the outcome." Id. at 694.

Mr. Lambertsen cannot satisfy either Strickland's objective standard of reasonable effectiveness or the actual prejudice prong. Either finding alone defeats Mr. Lambertsen's attempt to show cause why his procedural default should be ignored.

FAILURE TO OBJECT TO THE INDICTMENT

Mr. Lambertsen claims his trial attorney, Robert Turitt, rendered ineffective assistance when he failed to

timely object to a defective indictment. The government responds that regardless of whether Mr. Lambertsen's counsel was ineffective, there could be no actual prejudice because count forty-nine of the indictment is sufficient.

The indictment reads, "David Lambertsen... conspired to commit mail fraud." Contrary to Mr. Lambertsen's assertion, the lack of the words "knowingly, willingly, or intentionally" in the indictment doesn't render it flawed because a reasonable construction of the count includes the mens rea required. *See* United States v. Hernandez, 330 F.3d 964,978 (citing United States v. Wabaunesee, 528 F.2d 1,2 (7th Cir. 1975) (an indictment will not fail if it charges the offense by any reasonable instruction). The word "conspire," both in a legal and plain language context, requires a knowing, willful, and intentional participation by two or more people. MERRIAM-WEBSTER'S DICTIONARY 267 (11th ed. 2003) (definition 1A of conspire: to join in a secret agreement to do an unlawful or wrongful act); 18 U.S.C. §2.

Without knowledge of, willful participation in, or intent to commit, the actions by two or more people could not, by definition, be a conspiracy. The word "conspired" in the indictment adequately apprised Mr. Lambertsen of the charge he would have to defend, and he did not suffer any actual prejudice from its use.

2. THE PLEA NEGOTIATION

Mr. Lambertsen says he received ineffective assistance during the plea negation because Mr. Truitt's counter-offer to the government was ludicrous. The government argues that Mr. Truitt's actions were objectively reasonable; he was merely trying to get the best deal for his client.

Mr. Lambertsen is entitled to effective counsel during the plea negotiation process. *See* Paters v. United States, 150 F.3d 1043.1046 (7th Cir. 1998). Unlike the usual case, in which a defendant is objecting to the counsel he received when accepting or rejecting a plea, Mr. Lambertsen complains of the counter-offer made by Mr. Truitt. To prove this was ineffective assistance, Mr. Lambertsen must prove that Mr. Truitt's actions fell below the prevailing professional norms. Coleman v. United States, 318 F.3d 754, 758 (7th Cir. 2003). A reasonably competent attorney considers the facts and legal consequences of a guilty plea, considers an estimate of a likely sentence, and communicates his analysis to his client. United States v. Barnes, 83 F.3d 934, 939 (7th Cir. 1996).

Even by Mr. Lambertsen's admission, Mr. Truitt communicated the government's plea proposal to Mr. Lambertsen, and formulated a counter-offer that would have resulted in a significantly reduced sentence for Mr. Lambertsen. Mr. Truitt's tactics fall within the prevailing professional norms of seeding the best result for a client.

3. FAILURE TO WITHDRAW AND/OR BE A WITNESS

Mr. Lambertsen claims he received ineffective assistance of counsel when Mr. Truitt failed to either withdraw and be called as a witness or request a hearing when it became apparent that Ms. Dixie Grinnell's testimony differed substantially from statements she had preciously provided to the defense. Mr. Lambertsen must "overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy." Strickland v. Washington, 466 U.S. at 689 (quotations and citations removed). The presumption that defense counsel's action can be defined "sound trial strategy" is a strong one. Id.

Based on Mr. Lambertsen's own admissions, the court cannot find Mr. Truitt's decision to question Ms. Grinnell on

her statements rather than stop trial, withdraw as Mr. Lambertsen's attorney and then call himself as a witness, as overcoming this presumption. Moreover, Mr. Lambertsen hasn't shown how impeaching Ms. Grinnell on her alleged inconsistent statements would have altered the trial's outcome, so he has not shown how he suffered any actual prejudice.

4. FAILURE TO SEEK AND PROPERLY USE DISCOVERY

Mr. Lambertsen says he received ineffective assistance when Mr. Truitt failed to seek production of records in the government's possession that would have tended to exculpate Mr. Lambertsen. Mr. Lambertsen also claims that when Mr. Truitt later obtained possession of those records from him, Mr. Truitt did not utilize the records at the sentencing proceeding, which would have resulted in a reduction in the sentencing calculation and order of restitution.

In an effort to overcome the strong presumption that Mr. Truitt's actions were part of a sound trial strategy and to prove prejudice, Mr. Lambertsen submitted the records at issue with his §2255 petition, but didn't adequately explain how they would have altered the trial or his sentence.

The court's review of the records doesn't help understand how these documents, which contain a more comprehensive list of "investors" involved in the underlying conspiracy that Mr. Lambertsen was convicted of, would have helped Mr. Lambertsen's case, or why their absence hurt his case. Consequently, the court cannot find Mr. Truitt's strategy of not submitting them unreasonable, nor that Mr. Lambertsen's defense suffered any actual prejudice as a result.

5. FAILING TO RAISE THE DOUBLE COUNTING ISSUE AT TRIAL

Mr. Lambertsen claims he also received ineffective assistance when Mr. Truitt failed to challenge the double counting of Mr. Lambertsen's enhancements attributed to his sentence. His argument is undeveloped in both law and fact. Mr. Lambertsen offers virtually nothing in support of how his sentence was double counted, or even what his double counting theory is as applied to this case. "[P]erfunctory and undeveloped arguments, and arguments that are supported by pertinent authority, are waived." United State v. Wimberly, 60 F.3d 281, 287 (7th Cir. 1995).

6. THE JURY INSTRUCTIONS

Mr. Lambertsen says he received ineffective assistance of counsel when, before jury deliberation began, Mr. Truitt failed to object to the jury instruction relating to count forty-nine, on the grounds that it didn't address all elements of charges contained in the count, specifically aiding and abetting a conspiracy to commit mail fraud. Mr. Lambertsen also claims that he was prejudiced by Mr. Truitt's failure to directly address the jury's confusion by proposing a supplemental instruction, and failing to object to the supplemental instruction as given by the court.

Mr. Lambertsen raised both of these issues at appeal, so the court need only analyze these issues under Strickland's ineffective assistance test to determine if Mr. Truitt's actions were objectively unreasonable and Mr. Lambertsen suffered actual prejudice from the errors of which he complains. Strickland v. Washington, 466 U.S. at 687.

The court of appeals already found the jury instructions, and supplemental instruction, were proper as

given. Moreover, Mr. Lambertsen's co-defendant made the same objections now at issue, and the court overruled them. Mr. Lambertsen suffered no actual prejudice under Strickland, and thus he did not receive ineffective assistance.

7. ALLEGED CONFLICT OF INTEREST AT APPEAL

Mr. Lambertsen claims he received ineffective assistance of counsel when Mr. Truitt didn't recuse himself for a conflict of interest at the appeal process. When a conflict of interest is alleged between counsel and a defendant, the defendant has a lighter standard of proving the prejudice prong of the Strickland test. Cabello v. United States, 188 F.3d 871, 875 (7th Cir. Cir. 1999).

Even with this lower standard, Mr. Lambertsen has not shown how the alleged conflict actually prejudiced his appeal. When questioned by the court, Mr. Lambertsen didn't object or raise any issue of conflict when Mr. Truitt was appointed his appellate counsel. By Mr. Lambertsen's own admission, he was aware of the alleged conflict at that time; it arose during trial. Mr. Lambertsen doesn't explain to the court how Mr. Truitt's knowledge of Ms. Grinnell's alleged inconsistent testimony prejudiced his appeal. Without such a showing, Mr. Lambersen cannot be said to have suffered actual prejudice from Mr. Truitt's assistance on appeal.

8.FAILURE TO RAISE THESE ISSUES ON APPEAL

Mr. Lambertsen also asserts that Mr. Truitt's failure to raise any of the issues he raises in his §2255 petition at appeal was ineffective assistance. This argument is also undeveloped; Mr. Lambertsen provides no facts or law to support his proposition, so it is waived. *See* United states v. Wimberly, 60 F.23d at 287.

B. PROSECUTORIAL MISCONDUCT

For the first time, Mr. Lambertsen alleges the government engaged in prosecutorial misconduct by failing to disclose vital information in their possession which was favorable to him. Mr. Lambertsen must show cause as to why he did not raise this issue before and actual prejudice from the actions of which he complains. United State v. Frady, 456 U.S. 152, 167-168 (1982); Menzer v. United States, 200 F 3d. 1000, 1005 (7th Cir. 2000).

Mr. Lambertsen did not try to show cause for not raising the issue before, and even if he had, he could not show prejudice. This issue seems to be connected to the documents Mr. Lambertsen received from Dixie Lindell for his sentencing proceeding, and as already noted, Mr. Lambertsen hasn't explained how these records could have helped Mr. Lambertsen's position at either trial or sentencing. Moreover, it seems from Mr. Lambertsen's own statements that he had access to the documents during both the trial and the sentencing, so there could be no actual prejudice suffered by the government's alleged conduct. With neither cause shown to excuse Mr. Lambertsen from preciously raising this issue nor a showing of actual prejudice, Mr. Lambertsen's prosecutorial misconduct claim is procedurally defaulted.

C. DISPARATE TREATMENT

Mr. Lambertsen argues the government's disparate treatment between co-defendant Mr. Patrick Ballinger and himself constitutes impermissible fact bargaining and improperly prejudices Mr. Lambertsen's Sixth Amendment right to trial by jury. Since Mr. Lambertsen didn't raise this issue at either the trial or appellate level, he must show cause as to why he didn't raise this before, and actual prejudice. United States v. Frady, 456 U.S. 152, 167-168 (1982); Menzer v. United States, 200 F.3d 1000,1005 (7th Cir. 2000).

Mr. Lambertsen's sentence was calculated under the sentencing guidelines, as was that of his co-defendant, Mr. Ballinger. The court of appeals affirmed Mr. Lambertsen's sentence and the way it was calculated. See Untied States v. Sims, 329 F.3d 937, 946 (7th Cir. 2003). There is no disparate treatment between two defendants' sentences when the court properly calculates the two sentences under the sentencing guidelines. See Untied States v. Hall, 212 F.3d 1016, 1019 (7th Cir. 2000)

II. MOTION TO DISMISS THE INDICTMENT

Mr. Lambertsen concurrently filed a motion to dismiss the indictment with his §2255 petition. The motion is untimely. A party must challenge an indictment for failure to state an offense at any time while the case is pending. FED. R. CRIM. P. 12(b)(3)(B). Mr. Lambertsen's criminal case is no longer pending; judgment was entered on August 19, 2002 and affirmed on May 29, 2003. the court notes Mr. Lambertsen substantively raises the same argument against the indictment in his section §2255 petition, which the court found unsuccessful.

III. THE BLAKELY/BOOKER ISSUE

Mr. Lambertsen asserts he was unconstitutionally sentenced in light of the Supreme Court's ruling in Blakely v. Washington, __ U.S __, 124 S. Ct. 2531 (2004) and United States v. Booker, 543 U.S. __ (2005). The Supreme Court hasn't applied the rule applied in Blakely, and affirmed in Booker, retroactively to cases on collateral review. Consequently, Mr. Lambertsen's sentence, which the court determined before either Blakely or Booker, cannot be vacated, set aside, nor corrected based on those cases.

CONCLUSION

For the reasons stated above, the court DENIES the §2255 petition with prejudice as to every claim but the Blakely/Booker claim, which the court denies without prejudice, [Doc. No. 200] and DENIES the motion to dismiss the indictment [Doc. No. 203].

SO ORDERED.

ENTERED: January 21, 2005

/s/Robert L. Miller, Jr.
Chief Judge
United States District Court

[APPENDIX C]

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DAVID LAMBERTSEN,	)	
Petitioner	)	
	)	CAUSE NO.
	)	3:04 CV-32RM
UNITED STATES OF	)	arising from
	)	3:01-CR-4 (03) RM
AMERICA,	)	
Respondent	)	

ORDER

David Lambertsen requests a certificate of appealability to enable him to appeal the court's denial of his 28 U.S.C. §2255 petition. A "certificate of appealabiltiy may issue...only if the applicant has made a substantial showing of the denial of a constitutional right." 28.U.S. §2253.; accord Williams v. Parke, 133 F.3d 971, 975 (7th cir. 1998). Mr. Lambertsen must demonstrate that his constitutional issues are "debateable among jurists of reason" or "deserve encouragement to proceed further." Ouska v. Lynn Cahill-Maschling, 246 F.3d 1036, 1046 (7th Cir. 2001); Porter v. Gramley, 112 F.3d 1308, 1312 (7th Cir. 1997); *see also* Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983).

Mr. Lambertsen intends to argue on appeal that the indictment filed against him was insufficient, the court erred

in its instructions to the jury, and that he received ineffective assistance of counsel. For the reasons set forth in the denial of Mr. Lambertsen's §2255 petition, none of these claims make the requisite "substantial showing" of the denial of a constitutional right to authorize a certificate of appealability.

Furthermore, Mr. Lambertsen attempts to raise issues of the constitutionality of his sentencing, in light of United States v. Booker, 125 U.S. 738 (2005). Yet, in McReynolds v. United States, __F.3d __, Nos. 04-2520. 04-2632, & 04-2844, 2005 WL 23762 (7th cir. Feb. 2, 2005), the court of appeals held the Supreme Court's ruling in Booker does not apply retroactively to criminal cases that became final before its release on January 12, 2005").

Accordingly, the court DENIES Mr. Lambertsen's request for a certificate of appealabilty [Doc. No. 9]

SO ORDERED.

ENTERED: March 4, 2005

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

3:04-CV-327 RM

Dawn E. Caradonna PHV
PO Box 610
Peterborough, NH 03458

[APPENDIX D]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 20, 2005
Decided July 7, 2005

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 05-1708

DAVID LAMBERTSEN, Petitioner-Appellant	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
v.	No. 3:04-CV-327 RM
UNITED STATES OF AMERICA, Respondent-Appellee	Robert L. Miller, Jr. Chief Judge

ORDER

David Lambertsen has filed a notice of appeal from the denial of his motion under 28 U.S.C §2255 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record

on appeal. We find no substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253c(2).

Accordingly, the request for a certificate of appealability is DENIED.